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In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN H. STORY,
Petitioner,
vs.
THE STATE OF WYOMING,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT FOR
THE STATE OF WYOMING

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the issue of preaccusation delay was decided on adequate and independent state grounds.

II. Whether the lower courts have established a uniform rule for evaluating an alleged due process violation resulting from preaccusation delay.

III. Whether Petitioner has carried his burden of demonstrating actual prejudice.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, the State of Wyoming, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the judgment and opinion of the Supreme Court for the State of Wyoming.

STATEMENT OF THE CASE

Petitioner, John H. Story, was a physician engaged in the general practice of medicine in Lovell, Wyoming. In June of 1984, the local prosecuting attorney was informed that Petitioner had sexually assaulted several of his female patients during pelvic examinations. An investigation was immediately initiated, resulting in the filing of a criminal complaint on October 31, 1984. An information was filed on November 9, 1984, charging Petitioner with ten counts of second degree sexual assault, in violation of Section 6-4-303(a)(vii), Wyo.Stat. 1977 (as amended), and seven counts of rape, in violation of Section 6-63, Wyo.Stat. 1957. An amended information was filed on April 8, 1985, which reduced the charges to three counts of second degree sexual assault and six counts of rape.

On April 18, 1985, a jury convicted Petitioner of three counts of assault and battery with intent to commit rape, two counts of forcible rape, and one count of second degree sexual assault. The Wyoming Supreme Court affirmed five of the convictions and reversed one conviction for assault and battery with intent to commit rape. The counts of which Petitioner stands convicted occurred over a period of approximately ten years, from April 17, 1968 until October 3, 1977.

As noted by the Wyoming Supreme Court, *Story v. State*, 721 P.2d 1020, 1024 (Wyo. 1986), the evidence in support of the convictions was similar and demonstrated a definite pattern of conduct by Petitioner.

> "Dr. Story informed [the victims] that he would be using a new instrument, a round tube, to dilate them and facilitate the exam. He then inserted his penis into the vagina of all but one of the victims. All but one of the victims observed Dr. Story's erect penis out of his unzipped trousers. Some of the victims said Dr. Story

exposed himself to them by moving to the side of the examining table. All but one of the victims said Dr. Story penetrated them. When asked about their feelings and why some had not resisted and had not reported what had happened, they said they trusted Dr. Story, that they were shocked, afraid, and did not want to talk about it."

The evidence as to the April 17, 1968 charge, that involving the forcible rape of Terri Timmons, was somewhat different, in that Ms. Timmons was a 15-year-old high school sophomore when she consulted Petitioner regarding severe abdominal pains associated with the onset of her menstrual cycle. During the pelvic exam performed by Petitioner, she became aware that something different was happening, that Petitioner was hurting her with something "very, very warm and soft and it was bare flesh. . .pushing inside" of her. Ms. Timmons told her grandmother that Petitioner had hurt her, and informed her sister that Petitioner had raped her.

On appeal to the Wyoming Supreme Court, Petitioner argued that the delay in charging violated his due process rights under Article 1, section 6 of the Wyoming Constitution, and the Fifth Amendment and Fourteenth Amendment to the United States Constitution. The Wyoming Supreme Court held that the charges were timely brought, since Wyoming has no statute of limitations for any crime. *Story v. State*, 721 P.2d at 1027. The court also held that there occurred no violation of Petitioner's due process rights, since it was conceded that the State diligently investigated and prosecuted the case, and absolutely no showing had been made by Petitioner of substantial actual prejudice. *Id.*, 15 1028-1029.

REASONS FOR NOT GRANTING THE WRIT

I. THE ISSUE OF PREACCUSATION DELAY WAS DE-

CIDED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

In reviewing Petitioner's allegation that the delay in charging violated his due process rights, the Wyoming Supreme Court held that the charges were "timely and properly brought by the State," since Wyoming "has no statute of limitations for any criminal case." *Story v. State*, 721 P.2d at 1027. This analysis was consistent with the decisions of this Court, which have recognized that the applicable statute of limitations "is usually considered the primary guarantee against bringing overly stale criminal charges." *United States v. Ewell*, 383 U.S. 116, 122 (1966); see also *United States v. Marion*, 404 U.S. 307, 322 (1971); *United States v. Lovasco*, 431 U.S. 783, 789 (1977). A principal purpose of such statutes, encouraging prompt investigation by authorities, *Toussie v. United States*, 397 U.S. 112, 114-115 (1970), was met in Petitioner's case, since it was conceded that the allegations were swiftly investigated, and the matter promptly prosecuted. *Story v. State*, 721 P.2d at 1026.

The Wyoming Supreme Court's reliance on the lack of an applicable statute of limitations constitutes adequate and independent state grounds for the decision, which precludes this Court's review. *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945). Futhermore, the Wyoming court's analysis of the due process issue under the Wyoming Constitution, as well as the United States Constitution, may also immunize the decision from subsequent review. *Payton v. New York*, 445 U.S. 573, 600 (1980). For this reason, the petition for writ of certiorari should be denied.

II. THE LOWER COURTS HAVE ESTABLISHED A UNIFORM RULE FOR EVALUATING AN ALLEGED DUE PROCESS VIOLATION RESULTING FROM PREACCUSATION DELAY.

The cases of *United States v. Marion*, 404 U.S. 307 (1971), and *United States v. Lovasco*, 431 U.S. 783 (1977), establish the law pertaining to preaccusation delay. The Circuit Courts of Appeals have universally interpreted these cases to require a two part analysis in determining whether a defendant's due process rights were infringed by preaccusation delay. All of the circuits require as the first prong that the defendant show actual substantial prejudice, and in all but one circuit, the second prong requires a showing of purposeful delay by the government to gain a tactical advantage. *United States v. Marler*, 756 F.2d 206 (1st Cir. 1985); *United States v. Lawson*, 683 F.2d 688 (2nd Cir. 1982); *United States v. Otto*, 742 F.2d 104 (3rd Cir. 1984), *cert. denied* 105 S.Ct. 978 (1985); *United States v. Automated Medical Laboratories*, 770 F.2d 399 (4th Cir. 1985); *United States v. Ballard*, 779 F.2d 287 (5th Cir. 1986), *cert. denied* 106 S.Ct. 1518; *United States v. Duncan*, 763 F.2d 220 (6th Cir. 1985); *United States v. Sweeney*, 688 F.2d 1131 (7th Cir. 1982); *United States v. Jackson*, 714 F.2d 809 (8th Cir. 1983); *United States v. Valentine*, 783 F.2d 1413 (9th Cir. 1986); *United States v. Pino*, 708 F.2d 523 (10th Cir. 1983); *Stoner v. Graddick*, 751 F.2d 1535 (11th Cir. 1985); *United States v. Pollack*, 534 F.2d 964 (D.C.Cir. 1976). Many state courts have also adopted this two part analysis. *State v. Smith*, 699 P.2d 711 (Utah 1985); *State v. Wilbanks*, 509 P.2d 331 (Id. 1973); *State v. Royal*, 535 P.2d 413 (Kan. 1975); *State v. Stock*, 361 N.W.2d 280 (S.D. 1985); *State v. Cuevas*, 282 N.W.2d 74 (Ia. 1979); *State v. F.C.R.*, 276 N.W.2d 636 (Minn. 1979); *State v. Rogers*, 233 N.W.2d 480 (Wis. 1975).

Petitioner's attempt to convince this Court that there is "confusion" among the lower courts is without merit. Only the Ninth Circuit Court of Appeals does not follow the precise language regarding the second prong of the test, but that court still places the burden on the defendant to "show that the length of the delay, when balanced against the government's reasons for the delay, offends those 'fundamental conceptions of justice which lie at the base of our civil and

political institutions.' " *United States v. Valentine*, 783 F.2d at 1416, quoting *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985). This language merely implements the concept articulated in *United States v. Lovasco*, 431 U.S. at 790, that "the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." Furthermore, the Ninth Circuit still requires a showing of governmental misconduct, be it intentional, reckless, or negligent, *United States v. Moran*, 759 F.2d at 782, a standard consistent with the second prong articulated by the other circuits.

Petitioner's reliance on *Marks v. State*, 496 P.2d 66 (Alaska 1972), is misplaced. Although *Marks* was decided after *United States v. Marion*, the Alaska court did not rely thereon in deciding the case. Furthermore, all six circuit courts of appeals upon which the Alaska court did rely subsequently adopted the analysis articulated in *Marion*. Petitioner's citation to *Ross v. United States*, 349 F.2d 210 (D.C.Cir. 1965), is equally inappropriate. *Ross* has been repudiated. *State v. Wilbanks*, 509 P.2d at 337, n. 13; *United States v. Judice*, 457 F.2d 414 (5th Cir. 1972). Futhermore, *Ross* was decided by a divided court, and has been viewed more as an exercise of supervisory responsibility over the District of Columbia Metropolitan Police Force than as a clear statement of law on the issue of preaccusation delay. *State v. Royal*, 535 P.2d at 416.

Petitioner's contention that there is confusion among the lower courts, and that "[c]itizens in different jurisdictions are receiving different treatment," (Pet. p. 6), is incorrect and affords no basis for the exercise of this Court's discretion in granting certiorari. The Wyoming Supreme Court properly applied the universally accepted analysis in holding that Petitioner's due process rights were not violated by the preaccusation delay.

III. PETITIONER NEVER HAS CARRIED HIS BURDEN OF DEMONSTRATING ACTUAL PREJUDICE.

Since this Court's decisions in *United States v. Marion* and *United States v. Lovasco*, all of the federal circuits, and those state courts which have considered the issue, have required a defendant to demonstrate **actual** prejudice in order to show a denial of due process. See Argument II, *supra*, and cases cited therein. This is the test adopted by the Wyoming Supreme Court, and applied in determining that Petitioner did not establish any due process violation. *Story v. State*, 721 P.2d at 1027-1028.

Petitioner concedes that this is the proper test. (Pet. p. 8), but relies on out-dated holdings in arguing that he in fact carried his burden. It is important to note that Petitioner never raised this issue before the trial court. Most courts which have considered this issue have done so in the context of reviewing a lower court's denial of a motion to dismiss, following an evidentiary hearing at which factors relevant to any delay were developed. See, *e.g.*, *United States v. Warren*, 772 F.2d 827, 836 (11th Cir. 1985), *cert. denied sub nom. Moore v. United States*, 106 S.Ct. 1214 (1986); *United States v. Otto*, 742 F.2d 104 (3rd Cir. 1984); *United States v. Pino*, 708 F.2d 523 (10th Cir. 1983).

On appeal to the Wyoming Supreme Court, and in his petition to this Court, Petitioner makes only vague assertions of faded memory, which are clearly insufficient to sustain his burden. *United States v. Ballard*, 779 F.2d at 293-294; *United States v. Marler*, 756 F.2d at 214.

> "Vague and conclusory allegations of prejudice resulting from the passage of time and the absence of witnesses are insufficient to constitute a showing of actual prejudice for the purposes of impermissible preindictment delay; defendant must be able to show

definite and not speculative prejudice. . . ."

United States v. Jenkins, 701 F.2d 850, 855 (10th Cir. 1983).

Petitioner's contention that his vague memory as to the dates in question demonstrates actual prejudice ignores the controlling law and the facts in the case. The record reflects that Petitioner's own medical charts show that he saw each of the victims on the day in question, in most cases administering a pelvic exam. His own testimony did not contradict those charts. (R.A. Vol. VIII, pp. 1300-1301, 1303-1304, 1308-1309, 1321-1324). As a pragmatic matter, Petitioner's defense - that the assaults never occurred but were fabricated by the victims - would have been changed little by the passage of time. The evidence that he examined the victims on the dates of the assaults, and that he never had a nurse present in the examining room (R.A. Vol. VIII, pp. 1282-1283, 1328) would have been the same the day after the assaults. This undermines Petitioner's contention that he would have been able to present a defense but for the preaccusation delay.

Petitioner neither raised this issue before the trial court nor carried his burden on appeal of demonstrating actual prejudice. His failure to do so brings the inquiry full circle, back to the question of whether the charges were brought within the time period allowed under the statute of limitations. *Stoner v. Graddick*, 751 F.2d at 1540.

The Wyoming Supreme Court applied the appropriate test in concluding that Petitioner did not demonstrate actual prejudice, and thus his due process rights had not been violated. Petitioner's attempt to have this Court once again re-try his case must fail, as must his efforts to establish a rule which would reward a defendant for coercing victims into remaining silent for a sufficient period of time so that he could forever escape the consequences of his criminal acts.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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